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No. 15038

United States
Court of Appeals
for the Ninth Circuit

FRANK M. CHICHESTER, Trustee in Bank-
ruptcy of Estate of S. A. Willen Company, a
corporation, bankrupt, Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGE-
LES, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAY 24 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.



In the District Court of the United States, Southern District of California, Central Division
Division

In Bankruptcy No. 62222-BH

In the Matter of S. A. WILLEN COMPANY, a corporation, Bankrupt.

PETITION FOR RECLAMATION

To the Honorable Ben Harrison, Judge of the United States District Court, for the Southern District of California:

The petition of Union Bank & Trust Co. of Los Angeles, secured creditor of the estate of the above named debtor, respectfully represents:

(1) A portion of the said debtor's estate consists of the sum of Fifteen Thousand, Nine Hundred and ninety-one and 68/100 Dollars (\$15,991.68) which amount represents a portion of moneys received by the Trustee from the sale of certain machinery and equipment of the said bankrupt situated at Los Angeles, described in the inventory on file herein and being more particularly described in a certain mortgage of chattels dated February 4, 1953 and recorded in the office of the County Recorder of Los Angeles County, California, on the 20th day of February, 1953, to secure the payment of a certain note executed by the above named debtor [2] payable to your petitioner under the terms and conditions of the said mortgage.

2. On November 3, 1954, Frank M. Chichester, Trustee of the estate of the above named bankrupt, filed a petition for the sale of personal property free and clear of liens whereby he requested that an order be made requiring your petitioner, Union Bank & Trust Co. of Los Angeles, as mortgagee, to show cause before this Court why an order should not be made and entered, directing that all of said machinery and equipment described in his said petition and covered by the mortgage hereinbefore referred to, be sold by him as Trustee of the said bankrupt in the manner prescribed by the laws relating to bankruptcy, free of and from the lien of the said mortgage and that the proceeds arising out of and from the sale of the said property be held by him subject to the lien of the said mortgage to all intents and purposes as though the said property had not been sold, subject to the final order, judgment and decree of this Court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said mortgage.

(3) Pursuant to a stipulation entered into by and between Gabriel Hoffenberg, Attorney for Frank M. Chichester, Trustee of the above named debtor, and I. B. Kornblum, Attorney for Union Bank & Trust Co. of Los Angeles, petitioner herein, reference to which is hereby made and incorporated as if fully set forth herein, the Honorable David B. Head, Referee in Bankruptcy, on November 16, 1954, ordered that the said Frank M. Chichester, as Trustee of the above named debtor, be permitted, authorized and directed to sell and dispose of the said machin-

ery and equipment described in said inventory and chattel mortgage, free of and from the lien of the said chattel mortgage hereinabove referred to, subject to the further order, however, that the said Trustee retain the proceeds of and from the sale of the said machinery and equipment [3] which proceeds were to be held by him subject to the lien of the said mortgage to all intents and purposes as though the said property had not been sold, and to the final order, judgment and decree of this Court or the final order, judgment and decree of a court of competent jurisdiction as to the validity of the said chattel mortgage. The said stipulation further provided that nothing therein should be construed as an admission by your petitioner, the said Union Bank & Trust Co. of Los Angeles, of any of the allegations of the petition for sale of personal property free and clear of liens theretofore filed by the said Frank M. Chichester as Trustee for the above named debtor and that your petitioner, Union Bank & Trust Co. of Los Angeles shall be deemed to have denied all of the allegations therein contained excepting the allegations reciting the execution and delivery and recordation of the note and mortgage referred to in said petition for sale and the balance due thereon at that time of \$15,991.68. Said stipulation further provided for an amendment of one of the allegations of the said Trustee's petition to the end that the date of knowledge by the creditors of the existence of said note and mortgage alleged by the said Trustee as being February 20, 1954 was stipulated as being February 20, 1953.

(4) Your petitioner is informed and believes and therefore alleges that the Trustee did, pursuant to said petition and order, sell the said machinery and equipment and is now in possession of the moneys obtained therefrom, part of which includes the aforesaid \$15,991.68. Your petitioner has, since January 5, 1955, requested the said Trustee to either pay to it the balance due on the note secured by the said chattel mortgage out of the moneys held by him from the sale of the said machinery and equipment pursuant to said stipulation and order or to forthwith commence such proceedings as he may deem necessary to adjudicate the matter. [4] Responding to a request dated January 5, 1955, said Trustee did, on January 6, 1955, advise that he had instructed his counsel, Gabriel Hoffenberg, to proceed without delay in taking further proceedings for the purpose of determining the validity of said chattel mortgage held by your petitioner, Union Bank & Trust Co. of Los Angeles. Since said January 6, 1955, your petitioner has had no advice as to any such proceedings and believes that no further purpose will be served by any further delay in adjudicating the said matter. That certain allegations in the said petition with reference to the validity of the said note and mortgage, the legality and freedom from inferences of fraud are without merit and were made for the purpose of casting a reflection upon your petitioner's good faith in this transaction and should be determined forthwith.

(5) That there is now due, owing and unpaid on the obligation executed by the debtor, secured by the

aforesaid mortgage of chattels, the sum of \$15,-991.68 together with an additional amount of accrued interest from the date at which time the said amount was due for payment in accordance with the terms and conditions of the aforesaid note.

(6) That your petitioner has been compelled to engage I. B. Kornblum as its counsel in this matter and is obligated to pay him a reasonable fee amounting to \$350 for his services. That by reason of the circumstances hereinbefore related, this honorable Court should order the Trustee to pay said fees.

Wherefore, your petitioner prays that an order be made establishing the validity of the said note and chattel mortgage and that the Trustee be ordered to forthwith pay to your petitioner the sum of \$15,-991.68 together with such additional sum as shall have accrued thereon for interest under the terms and conditions of the said note and mortgage, together with the sum of \$350.00 counsel fees payable to I. B. Kornblum for his services [5] rendered herein and such other and further relief as to the Court may seem meet and equitable in the premises.

UNION BANK & TRUST CO. OF
LOS ANGELES

/s/ By H. N. HERZIKOFF,
Vice President

/s/ I. B. KORNBLUM,
Attorney for Petitioner

Duly verified. [6]

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY PETITION
FOR RECLAMATION OF UNION BANK &
TRUST CO. OF LOS ANGELES SHOULD
NOT BE GRANTED

Upon the filing and reading of the Petition of Union Bank & Trust Co. of Los Angeles, a secured creditor of the estate of the above named debtor and good cause appearing therefor,

It Is Hereby Ordered that Frank M. Chichester, Trustee of the estate of the above-named bankrupt, show cause before me in room 343, Federal Building, United States Post Office and Court House, 312 North Spring Street, Los Angeles, California on the 2d day of March, 1955, at the hour of 10 a.m., in the forenoon of said day or as soon thereafter as counsel can be heard,

(a) Why an order should not be made and entered herein declaring that the note and chattel mortgage held by the said Union Bank & Trust Co. of Los Angeles is a valid note and chattel mortgage. [7]

(b) Why the sum of Fifteen Thousand, Nine Hundred and ninety-one and 68/100 dollars (\$15,-991.68) together with such additional sum as shall have accrued thereon for interest under the terms and conditions of said note and mortgage should not forthwith be paid by said Trustee to said petitioner, Union Bank & Trust Co. of Los Angeles.

(c) Why the sum of \$350.00 should not be paid to

I. B. Kornblum by said Frank M. Chichester, Trustee of the above entitled debtor, as counsel fees for his services rendered herein.

It Is Further Ordered that service of a copy of this Order, together with a copy of the Petition upon which it is based, by mail, on or before February 19, 1955 to the said Frank M. Chichester, Trustee, shall be deemed good and sufficient service hereof.

Dated: February 15, 1955.

/s/ DAVID B. HEAD,

Referee in Bankruptcy

[8]

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR RECLAMATION

The answer of Frank M. Chichester, trustee of the estate of the above named bankrupt, appearing herein as respondent to the Petition for Reclamation, verified on behalf of Union Bank & Trust Co. of Los Angeles on the 11th day of February, 1955, and filed on February 15, 1955, respectfully states:

1. Respondent admits the allegations contained in paragraphs 1, 2 and 3 of the said petition.
2. In answer to paragraph 4 of the said petition,

respondent admits, denies and alleges as follows, to wit:

(a) Admits that respondent, as such trustee, did, pursuant to order of the Referee herein, sell the machinery and equipment referred to in the said petition and that, as such trustee, he now is in possession of the moneys obtained from such sale; admits that the said moneys include the sum of \$15,991.68 shown in the inventory on file herein as being a balance due on a [9] promissory note executed by the above named bankrupt in the original amount of \$27,125.04 payable to Union Bank & Trust Co. of Los Angeles.

(b) Admits that on or about January 5, 1955, the attorney for the said Union Bank & Trust Co. requested respondent, as such trustee, pay to the said bank the said balance out of the moneys held by respondent, as aforesaid, or to commence proceedings to have the matter adjudicated, and that this respondent thereupon advised the said attorney that he had discussed the matter with his own counsel, and that it was respondent's understanding that his counsel would proceed without delay.

(c) Admits that respondent, upon the advice of his counsel, has not heretofore commenced any such proceedings.

(d) Denies that any allegation whatever contained in respondent's petition heretofore filed herein with reference to the said note (or the chattel mortgage claimed by said bank to secure payment thereof) is without merit, and denies that any of such allega-

tions was made for the purpose of casting any reflection upon the good faith of the said bank, whether as alleged in the said paragraph 4, or otherwise.

(e) Admits that the question of the validity or invalidity of the chattel mortgage referred to in the said petition should now be determined herein as promptly as possible.

(f) Alleges that the Referee herein on September 15, 1954, made his order authorizing respondent, as such trustee, to employ the services of T. M. Mulherin, Certified Public Accountant, to conduct an investigation and examination of the records of the said bankrupt; that on January 13, 1955, the said Referee made his further order authorizing respondent to extend the employment of the said accountant to continue such investigation and examination; that the said accountant submitted his written report of such investigation and examination under date [10] of February 9, 1955, and that the said report, setting up various schedules and analyses of accounts of the said bankrupt, and making reference to the chattel mortgage referred to in the said petition, was delivered to respondent's counsel on February 22, 1955; that upon advice of his said counsel, respondent withheld the commencement of any proceedings herein to have determined the matter of the validity or invalidity of the said chattel mortgage until such time as his counsel could complete a study and analysis of the said report; that such study and analysis now have been completed; that by reason

thereof respondent now is prepared to have such matter determined.

3. Respondent has no information or belief upon the subjects sufficient to enable him to answer the allegations contained in paragraphs 5 and 6 of the said petition, and placing his denials on that ground, denies each and every allegation contained in the said paragraphs and each thereof.

Further answering the said petition and by way of setting forth his affirmative defense thereto, together with his denial that petitioner is entitled to the status of a secured creditor of the estate of the said bankrupt, this respondent respectfully represents:

1. That under date of February 4, 1953, the above named bankrupt executed its promissory note payable to Union Bank & Trust Co. of Los Angeles in the principal sum of \$27,125.04; that under the same date, the said bankrupt executed a chattel mortgage purporting to secure payment of the said note, such mortgage having been recorded February 20, 1953, in the office of the County Recorder of the County of Los Angeles, State of California, as Document No. 3501 in Book 41034, Page 34, Official Records of said Los Angeles County; that a copy of the said chattel mortgage is attached hereto, marked Exhibit "A" and made a part [11] hereof.

2. Respondent is informed and verily believes, and therefore alleges (a) that by the terms of the

said note, its principal, together with interest at the rate of $4\frac{1}{4}\%$ per annum, was payable in twenty-four monthly installments of \$1,130.21 each, beginning March 20, 1953.

Respondent is further informed and verily believes, and therefore alleges, (a) that as at February 23, 1954, payments made by the bankrupt on the said note had reduced its principal amount to \$9,016.68, (b) that on or about the said February 23, 1954, the said bank granted and made a new and additional loan to the bankrupt in the amount of \$10,425.00, the amount of \$10,000.00 thereof representing principal and the amount of \$425.00 thereof representing prepaid interest and that such loan was payable in monthly installments of \$868.75 each, (c) that the chattel mortgage hereinbefore referred to purports to secure the aforementioned loan of \$10,425.00, as well as any unpaid balance of original loan of \$27,125.04, and (d) that the said additional loan was made without the knowledge of the creditors of the bankrupt, or any thereof.

3. That the said bankrupt represents in its Debtor's Petition on file herein (Schedule A2, Page 3, the balance of \$15,990.00 (approximately) due or claimed under the said mortgage to be a debt contracted on or about February, 1953, for loan.

4. Respondent is further informed and verily believes, and therefore alleges that the said bank now is the holder of each of the said two notes.

5. Respondent is further informed and verily believes, and therefore alleges, (a) that on the date of

the execution of the said mortgage, to wit, February 4, 1953, the said bankrupt was insolvent and that its property at a fair valuation thereof [12] was insufficient to pay all of its debts in full, which fact the said Union Bank and Trust Company of Los Angeles, as the named mortgagee knew, or had reasonable cause to believe, and (b) that on the date of the granting and making by the said bank to the bankrupt of the aforementioned new and additional loan of \$10,425.00, to wit, on or about February 27, 1954, the bankrupt was insolvent and that its property at a fair valuation thereof was insufficient to pay all of its debts in full, which fact the said bank knew, or had reasonable cause to believe.

6. Respondent is further informed and verily believes, and therefore alleges, (a) that each of the said notes, purported to be secured by the said chattel mortgage, was endorsed by Joseph Speegleman, as guarantor, and that each thereof now bears his endorsement, and (b) [that the said Joseph Speegleman is the father-in-law of Martin G. Kaplan, one of the partners of the firm of Los Angeles Cotton Company, one of the creditors of the estate of the said bankrupt.]*

* Stricken 3/16/55.

7. That on the date of the execution of the said original note and the said chattel mortgage, to wit, February 4, 1953, names of creditors of the said bankrupt, together with the amount owing to each of them, according to the bankrupt's books and records, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,941.27
Crest Pacific Co.....	75.00
E. B. Dixon.....	8,695.02
Herbert Heyman	289.12
Los Angeles Cotton Co.....	29,131.92
L. A. Stamp & Stationery Co.....	8.34
Mudrick Machine Works.....	510.89
Newco Fibre Co.....	41,360.39
Portco Corp.	179.61
Shell Oil Co.....	101.36
Steller & Skoog Hardware.....	63.68
Sugarman Bag & Burlap Co.....	811.89
Van Waters & Rogers, Inc.....	19,582.58
Walley & Davis.....	606.07
	<hr/>
	\$103,357.14
	<hr/>

8. That on the date of recordation of said chattel mortgage, to wit, February 20, 1953, names of creditors of the said bankrupt, together with the amount owing to each of them, according to the said books and records, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,461.05
Crest Pacific Co.....	100.00
E. B. Dixon	9,428.82
Herbert Heyman	124.12
Los Angeles Cotton Co.....	27,580.55
L. A. Stamp & Stationery Co.....	8.34
Mudrick Machine Works.....	526.64

Creditors (Cont.)	Amount Owing
Newco Fibre Co.....	42,760.80
Portco Corp.	167.84
Steller & Skoog Hardware.....	72.97
Sugarman Bag & Burlap Co.....	811.89
Van Waters & Rogers, Inc.....	20,183.73
Walley & Davis.....	606.07
	<hr/>
	\$103,832.82
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9. Respondent is further informed and verily believes, and therefore alleges, that the creditors of the said bankrupt hereinabove named, as at the date of of the execution of the said mortgage, to wit, February 4, 1953, had no knowledge of the existence thereof, and that they had no such knowledge until [14] the date of recordation thereof, to wit, February 20, 1953.

10. That on the date of the filing of the Petition for Bankruptcy herein, to wit, July 29, 1954, the names of creditors of the said bankrupt, who were such creditors at the date of said execution and at the date of the said recordation, together with the amount owing to each of them, according to the schedule on file in these bankruptcy proceedings, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,400.91
Crest Pacific Co.....	125.00
E. B. Dixon.....	2,267.61
Herbert Heyman	597.50

Creditors (Cont.)	Amount Owing
Los Angeles Cotton Co.....	10,645.20
L. A. Stamp & Stationery Co.....	55.52
Mudrick Machine Works.....	1,211.69
Newco Fibre Co.....	45,847.60
Portco Corp.	525.76
Steller & Skoog Hardware.....	208.77
Sugarman Bag & Burlap Co.....	188.04
Van Waters & Rogers, Inc.....	8,895.41
Walley & Davis.....	25.00

That each of the above named creditors still and now is a creditor of the said bankrupt estate, and that each of them has a claim against the said estate provable in bankruptcy; that none of them became a creditor subsequent to the date of recordation of the said chattel mortgage. [15]

That during the interval between date of execution of the said mortgage (February 4, 1953) and the date of recordation thereof (February 20, 1953) the rights of numerous creditors were affected in this: they extended additional credit, having no knowledge of the mortgage, and as a result thereof the amounts of their respective claims, now provable in bankruptcy, were substantially increased, all by reason of the withholding of the mortgage from record for a period of sixteen days; that such tardy recordation produced a material change in the creditor status of each creditor so affected.

Wherefore, respondent, having fully answered the said petition, prays that an order be made herein:

(a) Declaring the said mortgage to be invalid as to general creditors of the said bankrupt estate, and decreeing the petitioner herein to be a general creditor;

(b) Ordering respondent, as such trustee, to retain the proceeds of sale of the said machinery and equipment for the account and for the benefit of general creditors; and

(c) For such other and further relief as to the Court may appear fit and proper.

/s/ FRANK M. CHICHESTER
BROOKS AND HOFFENBERG

/s/ By LON A. BROOKS,
Attorneys for Respondent

Duly Verified. [16]

Affidavit of Service by Mail Attached. [18]

[Endorsed]: Filed Mar. 9, 1955.

[Title of District Court and Cause]

UNION BANK AND TRUST COMPANY VS.
TRUSTEE MEMORANDUM BY REFEREE

The petitioner, Union Bank and Trust Company, has petitioned for reclamation of a sum of money, \$15,991.68, now in the hands of the trustee herein. This represents the proceeds of the sale of certain machinery and equipment under an order which transferred claims of lienors to the proceeds of sale. Petitioner's claim is based on notes and a chattel mortgage.

The trustee opposes the petition alleging that the Chattel mortgage is invalid as to him because of an unreasonable delay in recording the chattel mortgage after its execution.

On February 4, 1953 the original note and mortgage were delivered into an escrow set up with the petitioner, Union Bank and Trust Company, in an effort to comply with 3440.1 California Civil Code, which relates to the sale or [26] assignment of stocks in trade in bulk. Notice of intention to mortgage chattels was recorded on February 5th. The nature of the bankrupt's business did not require compliance with section 3440.1. On February 20, 1953, the escrow terminated by the terms of the escrow contract. On the same date, the chattel mortgage was recorded. It was stipulated that testimony would show that creditors existing prior to the recording were creditors at the time of bankruptcy.

Assuming that the escrow was proper, the date of execution is fixed by delivery at the termination of the escrow, section 1933, California Code of Civil Procedure. In *re Quartz Crystal Products Co.*, 71 F. Supp. 949, *Citizens Bank v. Gardner*, 161 F. 2d, 530. The recording occurred on the day the escrow terminated and was timely within the provisions of section 2957 California Civil Code. If the escrow was not effective, then the delivery occurred on February 4th and the 16 day delay in recording invalidates the mortgage as to creditors. *Williams v. Belling*, 76 C.A. 610. In *re Kessler*, 90 F. Supp. 1012.

The difficulty in this case arises from the fact that the purported delivery or deposit of the chattel mortgage in escrow was made with the petitioner who was also the mortgagee. Section 1056, California Civil Code, reads as follows:

“A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.”

The next section 1057 provides:

“A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in [27] the possession of the third person, and subject to condition, it is called an escrow.”

All of the texts, encyclopedias and cases I have examined agree that a party to a transaction cannot also act as escrow holder. I quote from 19 Am. Jur. 431:

“It is essential to an escrow that the instrument be delivered to a stranger or third person. The phrase ‘stranger’, or ‘third person’, as used in the definitions of escrow, means a stranger to the instrument, not a party to it, or a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depositary to both parties without involving a breach of duty to either.”

To the same effect, 18 Cal. Jur. 2d, 324:

“The escrow holder must be a stranger to the

transaction which is the subject matter of the escrow, since the ancient rule that delivery of a deed to the grantee as an escrow is to be taken as an absolute delivery is incorporated in the Civil Code.”

No case has been cited by counsel nor have I found any which directly answers the question that has been raised. The petitioner relies on *Hotaling v. Hotaling*, 193 C. 368. In that case the court held that the rule of section 1056, Civil Code does not come into effect until there has been a delivery, and that delivery does not depend entirely on the “manual tradition” of the document, but that by change of possession of the document, the grantor must have intended to divest himself of title. In the absence of such intent “there was no delivery”. The ruling in this case cannot help the petitioner herein. If applicable, it would lead to the conclusion that there was no delivery and from that, that the chattel mortgage never became effective. In its decision, commenting on the rule of section 1056, Civil Code, the court said:

“The validity of this rule is not open to question, but it comes into application only when there has been a delivery.” [28] In the instant case the petitioner cannot deny delivery, otherwise it would be completely out of court. The other case is that of *Citizen’s Bank v Gardner*, 161 F. 2d 530. In this case the escrow holder and the mortgagee were the same person. I have examined the whole case and find that the question here involved was not raised in that case. It is fundamental that an appellate

court considers and acts only on the questions presented by the appeal. The only case I have found in which the rule of section 1056 was relaxed (if it was) in favor of a bank acting as escrow holder is that of *Portugese American Bank v Schultz*, 49 C.A. 508, wherein the court held that a subsequent assignment of notes held in escrow by a bank to the bank did not invalidate an escrow set up with the bank as escrow holder.

I am aware of the definition of the term "grant" in sec 1053, Civil Code. I conclude that chattel mortgages, which transfer in writing liens on personal property, come within this definition. *Rockefeller v Smith*, 104 C.A. 544 at 547. See also sec 1627, Civil Code. Even though chattel mortgages are excluded from the definition, the general principles of law concerning escrows would lead to the same conclusions that I have reached. 19 Am. Jur. 431, *supra*.

It is clear that in this case the delivery to the petitioner was intended as a delivery in escrow. The intended escrow holder was a party to the transaction. Therefore, under the law as I have found it to be, the delivery to the petitioner and mortgagee was absolute and took effect on February 4, 1953. The only alternative conclusion would be that there was no delivery. See *Hotaling v Hotaling*, *supra*. It follows that the mortgage was not timely recorded so that it is effective against creditors. [29]

I can take notice of the fact that in recent years, banks in California have set up escrow departments

which are separate from their other departments. In fact, in view of this separation from ordinary banking operations, I can see no reason why it would not be safe to relax the rule to permit the escrow department of a bank to act as escrow holder where the bank was a party in interest. However, this is a matter for the legislature.

Counsel for the respondent trustee may prepare, file and serve proposed findings of fact, conclusions of law and order to be entered in conformance with Local Rule 7a. [30]

Dated this 9th day of June, 1955.

/s/ DAVID B. HEAD

Referee in Bankruptcy

[Endorsed]: Filed June 9, 1955.

[Title of District Court and Cause.]

AMENDED (a) FINDINGS OF FACT, (b) CONCLUSIONS OF LAW, AND (c) ORDER DECREETING CHATTEL MORTGAGE INVALID AS TO TRUSTEE AND CREDITORS

Union Bank & Trust Co. of Los Angeles, by its attorney I. B. Kornblum, Esq., having filed with the undersigned Referee in Bankruptcy its Petition for Reclamation praying

(a) That an order be made establishing the validity of a certain note and chattel mortgage described in the said petition, and

(b) That Frank M. Chichester, the Trustee in Bankruptcy herein, be ordered to pay forthwith to the said bank as petitioner, out of the proceeds of sale of the above named bankrupt's machinery and equipment now retained by the said trustee under order of this Court, the sum of \$15,991.68, representing the sum allegedly due on the said note, together with such additional sum as shall have accrued thereon for interest under the terms and conditions of the note and mortgage, together with the sum of \$350.00 counsel fees to the petitioner's said attorney for his services rendered in connection with the petition so filed; and [31]

An Order to Show Cause why the said petition should not be granted having been issued by the undersigned Referee returnable on the 2nd day of March, 1955, at the hour of 10:00 o'clock A.M.; and hearing on the said Order to Show Cause and Petition having been continued by stipulation of the petitioner and the trustee, through their respective attorneys, to March 16, 1955, at 10:00 o'clock A.M.;

The said trustee, by his attorneys Brooks and Hoffenberg, having answered the said petition, alleging the invalidity of the said chattel mortgage as to the trustee by reason of an unreasonable delay in recording the mortgage after its execution;

The Order to Show Cause and the Petition came on regularly for hearing on the said 16th day of March, 1955, at 10:00 o'clock A.M., the petitioner Union Bank & Trust Co. of Los Angeles appearing by its attorney I. B. Kornblum, Esq., and the Trustee in Bankruptcy Frank M. Chichester appearing

by his attorneys Brooks and Hoffenberg, by Lon A. Brooks, Esq., the testimony having been taken and various exhibits having been received in evidence by reference to the files and records of this proceeding, and the matter having been argued by the attorney for the petitioner and the attorney for the trustee, and thereafter having been submitted on briefs and memoranda of authorities filed herein by attorneys for both the petitioner and the trustee, and the court having considered the testimony, the evidence and the records and files of this proceeding, and being fully advised in the premises, and having arrived at a decision, now makes and enters the following

Findings of Fact

I.

That under date of February 4, 1953, S. A. Willen Co., [32] a corporation, the debtor-bankrupt herein, executed its promissory note, payable to Union Bank & Trust Co. of Los Angeles, the petitioner herein.

II.

That under the said date of February 4, 1953, the said debtor executed a chattel mortgage to the said Union Bank & Trust Co. of Los Angeles, as mortgagee, securing payment of the said note.

III.

That on the said February 4, 1953, the said note and the said chattel mortgage securing its payment were manually delivered and deposited into an escrow set up with the petitioner Union Bank & Trust

Co. of Los Angeles, as escrow holder; that the said bank thereupon, and thereafter until February 20, 1953, was both mortgagee and escrow holder in the note-mortgage transaction between the debtor and the bank.

IV.

That said promissory note and said chattel mortgage were deposited into escrow as part of a transaction whereby S. A. Willen Company would borrow from the petitioner on February 20, 1953, sums of money, as more specifically set forth in said chattel mortgage, a copy of which is attached to the trustee's answer to the petition for reclamation. On said February 4, 1953, as part of said transaction, S. A. Willen Company executed a notice of intention to mortgage chattels, and as a part of the said transaction said notice of intention to mortgage chattels was recorded by the petitioner on February 5, 1953, in the office of the County Recorder of the County of Los Angeles, State of California. That said notice of intention to mortgage chattels provided that the executed mortgage would be delivered and the consideration therefor paid on February 20, 1953.

V.

That on the said February 4, 1953, and at all times [33] thereafter to the date of bankruptcy, the debtor's business was that of jobbing and manufacturing cotton products; that the mortgage by the debtor of machinery and equipment, as evidenced by the chattel mortgage executed to the said bank on February 4, 1953, was not the mortgage of the fixtures or store

equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner or dyer, or retail or wholesale merchant.

VI.

That by the terms of the escrow contract said escrow closed on February 20, 1953, and that on said date the said chattel mortgage was recorded in the office of the said County Recorder and that on said date the amount of the loan was paid to S. A. Willen Company.

VII.

That a period of sixteen days elapsed from the date said chattel mortgage was signed and deposited with the escrow department of petitioner and the date of its recordation.

VIII.

That creditors of the bankrupt estate existing prior to the date of recordation of the said chattel mortgage were such creditors at the time of bankruptcy; that during the interval between the date of execution of the said mortgage, February 4, 1953, and the date of recordation thereof, February 20, 1953, amounts of creditors' claims against the debtor were increased.

IX.

That upon the petition of the trustee herein and pursuant to stipulation of the attorney for the said bank and the attorneys for the trustee, and under order of this Court, the said trustee sold for cash

the machinery and equipment of the said bankrupt free of and from the lien of the said chattel mortgage; that the machinery and equipment so sold is that described in the said chattel mortgage; that the said trustee now holds and retains [34] the proceeds of and from the sale of the said machinery and equipment subject to any valid lien of the said chattel mortgage and subject further to the final order, judgment and decree of this Court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said chattel mortgage.

X.

That the principal balance of the said note, at date of bankruptcy, was the sum of \$15,991.68.

XI.

That the trustee herein now has in his possession, as a part of the bankrupt estate, the equivalent in amount of the said balance, to wit, the sum of \$15,991.68, representing a portion of the proceeds of sale of the said machinery and equipment made under the order of this Court; that the said order transferred claims of lienors to the proceeds of sale.

XII.

That the petition of the said Union Bank & Trust Co. of Los Angeles filed herein on February 15, 1955, is a petition for reclamation of the said sum of \$15,991.68 representing the said portion of proceeds of sale, together with accrued interest thereon and the sum of \$350.00 for fees of petitioner's attorney.

Based on the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That the provisions of Section 3440.1 of the Civil Code of the State of California have no application to the transaction evidenced by the execution and delivery of the note and chattel mortgage here under consideration. [35]

II.

That the notice of intention to mortgage chattels recorded by the petitioner on February 5, 1953, was ineffective.

III.

That the escrow created by the note-mortgage transaction, in which the said bank was both the mortgagee and the escrow holder, was ineffective.

IV.

That the date of delivery of the said chattel mortgage was February 4, 1953; that such delivery was absolute and took effect on the said date.

V.

That by reason of the delay of sixteen days: from February 4, 1953, to February 20, 1953: in recording the said chattel mortgage, the rights of creditors were adversely affected; that the said delay was an unreasonable one and as such rendered the mortgage ineffective as against creditors and invalid as to the trustee.

VI.

That the lien of the said chattel mortgage is not a valid or subsisting lien as to the trustee or as to creditors of the bankrupt estate; that the claim of the petitioner Union Bank & Trust Co. of Los Angeles in these bankruptcy proceedings is not a valid secured claim.

VII.

That the petitioner Union Bank & Trust Co. of Los Angeles is not entitled to the relief prayed for in its petition and is entitled to take nothing by its said petition.

VIII.

That the Trustee in Bankruptcy is entitled to have the said chattel mortgage decreed to be invalid and of no force or effect [36] as to him, as such trustee, or as to creditors of the bankrupt estate.

IX.

That title to the sum of \$15,991.68 in cash described and set forth in the said petition, and now held and retained by Frank M. Chichester as Trustee in Bankruptcy as part of the proceeds of sale of the bankrupt's machinery and equipment, is vested in the said trustee for the benefit of all unsecured creditors of the debtor, and the petitioner has no valid lien thereon as against the trustee or the bankrupt estate; that petitioner bank has no title to the said sum, or any part thereof, except as a general unsecured creditor of the debtor to the extent of the amount for which its claim is allowed.

Order Decreeing Chattel Mortgage Invalid as to
Trustee and Creditors.

Pursuant to the foregoing Findings of Fact and
Conclusions of Law, it is

Ordered and Decreed:

I.

That the Petition for Reclamation of Union Bank
& Trust Co. of Los Angeles, filed herein February
15, 1955, be, and the same hereby is, denied, and that
the said bank take nothing by its said petition.

II.

That the chattel mortgage executed by S. A. Wil-
len Co., a corporation, now the bankrupt herein, in
favor of Union Bank & Trust Co. of Los Angeles,
under date of February 4, 1953, is, and is hereby de-
clared to be, invalid and of no force or effect as to
Frank M. Chichester, the Trustee in Bankruptcy
herein, or as to [37] creditors of the bankrupt es-
tate.

III.

That the sum of \$15,991.68 in cash described and
set forth in the said petition, and now in possession
of the said trustee be, and it hereby is declared to
be, a part of the net proceeds of the sale of the said
bankrupt's machinery and equipment, and as such
available to the trustee in the administration of the
bankrupt estate; that petitioner Union Bank &
Trust Co. of Los Angeles has no right, title, claim,
interest or lien thereto, therein, or thereon, save and

except as a general unsecured creditor of the bankrupt, and on the same basis as other general unsecured creditors to the extent that such claim may be allowed by this Court.

IV.

That the said trustee take, have and hold title to the said sum of \$15,991.68 for the benefit of all unsecured creditors of the bankrupt estate free from and of any security or lien whatsoever of the said chattel mortgage.

Done at Los Angeles in the Southern District of California, this 1st day of August, 1955.

/s/ DAVID B. HEAD,

Referee in Bankruptcy

BROOKS AND HOFFENBERG

By LON A. BROOKS,

Attorneys for Trustee

[38]

Affidavit of Service by Mail Attached. [39]

[Endorsed]: Filed Aug. 1, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF
REFEREE DATED AUGUST 1, 1955

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of the Union Bank & Trust Co. of Los Angeles for review of the order dated August 1, 1955, respectfully represents as follows:

I.

Petitioner is a secured creditor of the above named bankrupt and a reclaimant in the within bankruptcy proceedings.

II.

Petitioner is aggrieved by the order herein of the Honorable David B. Head, Referee in Bankruptcy, dated August 1, 1955, a copy of which order, together with the findings of fact and conclusions of law upon which it purports to be based, is attached hereto, marked Exhibit "A", and made a part hereof.

III.

Petitioner prays for a review of said order and complains that the court committed error in making the said order in the [40] following particulars:

(a) Said order is based upon an erroneous determination that the chattel mortgage in favor of petitioner became effective as a mortgage on February 4, 1953, the date it was signed and deposited in escrow, rather than February 20, 1953, the date on which the escrow closed.

(b) So much of Finding No. III as states that from February 4, 1953 until February 20, 1953, petitioner was both mortgagee and escrow holder in a note-mortgage transaction between the debtor and petitioner is erroneous and contrary to the evidence in that the evidence shows that both the petitioner and S. A. Willen Company intended that the mort-

gage be delivered and the consideration therefor paid on February 20, 1953, and shows that the mortgage did not become effective until February 20, 1953.

(c) Finding No. V is erroneous and contrary to the evidence in that the evidence shows that the debtor herein was in the business of jobbing and distributing cotton products and was, therefore, conducting the business of a wholesaler.

(d) The Referee failed to make a finding in accordance with the evidence that the chattel mortgage was not accepted until February 20, 1953, at which time the proceeds of the loan for which said chattel mortgage was security was paid to S. A. Willen Company.

(e) Conclusion of Law No. I is contrary to law and based upon erroneous findings of fact.

(f) Conclusion of Law No. II is contrary to law and is based upon erroneous findings of fact in that said notice of intention to mortgage chattels was effective, among other things, to indicate the intention of the parties as to the effective date of delivery of the chattel mortgage and was further effective as a compliance with Section 3440.1 of the California Civil Code.

(g) Conclusion of Law No. III is contrary to law and is based upon an erroneous application of Section 1056 of the California [41] Civil Code, which provides that a grant cannot be delivered to the

grantee conditionally, in that said section is not applicable to a chattel mortgage and that a chattel mortgage can be delivered conditionally.

(h) Conclusion of Law No. IV is contrary to law in that absolute and effective delivery of said chattel mortgage was on February 20, 1953.

(i) Conclusion of Law No. V is contrary to law and based upon erroneous findings of fact in that no delay in recording occurred at all since the delivery of said chattel mortgage was as of February 20, 1953, and for the further reason that even if delivery had been made on February 4, 1953, nevertheless, under the circumstances of this case, the delay in recording was justified and not unreasonable.

(j) Conclusions of Law Nos. VI, VII, VIII and IX are, and each of them is, contrary to law in that they are based upon erroneous Conclusions of Law Nos. I through V, inclusive, as hereinabove specified in subparagraphs (e), (f), (g), (h) and (i).

Wherefore, petitioner prays that said order be reviewed by a Judge herein in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed, and that an order be made upholding the validity of petitioner's chattel mortgage and ordering the payment of the sums due petitioner as set forth in the Petition for Reclamation on file herein, and that petitioner have such other and further relief as is just and proper in the premises.

UNION BANK & TRUST CO. OF
LOS ANGELES

/s/ By ROBERT E. GETZ,
Its Vice-President,
Petitioner

LOEB AND LOEB

/s/ By ALFRED I. ROTHMAN,
Attorneys for Petitioner [42]

[Exhibit A is a duplicate of Amended Findings of Fact, etc. set out at pages 23-32 of this printed record.]

Affidavit of Service by Mail attached.

Duly Verified. [51]

[Endorsed]: Filed Aug. 11, 1955.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the
United States District Court, Southern District
of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of
this court, do certify as follows:

The Union Bank and Trust Company filed its
petition herein for reclamation of the sum of \$15,-
991.68, representing a sum which was earmarked as
the proceeds of a sale by trustee of certain personal

property of the bankrupt against which the petitioner claims a lien by reason of a chattel mortgage.

The matter was heard, submitted and I filed findings, conclusions, and an order holding the chattel mortgage invalid as to the trustee and denying the petition. The petitioner has filed a petition for review.

The questions involved are discussed in a memorandum [52] opinion which I filed in the case.

I further certify the following documents:

1. Petition for Reclamation
2. Order to Show Cause on Petition
3. Answer to Petition for Reclamation
4. Memorandum by Referee
5. Substitution of Attorneys
6. Findings, Conclusions and Order
7. Reporter's Transcript of Proceedings
8. Exhibits 1, 2, 3, 4 and 5
9. Petition for Review

Dated: September 23, 1955.

Respectfully submitted,

/s/ **DAVID B. HEAD,**

Referee in Bankruptcy

[53]

[Endorsed]: Filed Sep. 23, 1955.

In the District Court of the United States, Southern
District of California, Central Division.

In Bankruptcy, No. 62,222-BH

In the Matter of S. A. WILLEN COMPANY, a
corporation, Bankrupt.

MEMORANDUM OPINION

This is a review of an order by a Referee declaring to be void and of no effect a certain mortgage held by the Union Bank and Trust Company of Los Angeles as against the Trustee in Bankruptcy upon certain property of the bankrupt estate. The amount alleged to be due the bank was \$15,991.68 held by the Trustee as proceeds of the sale of the mortgaged property, under a stipulation whereby the lien of the bank was transferred to the proceeds of the sale of the mortgaged property.

It appears from the record that on February 4, 1953, the mortgagor executed the instruments and manually delivered them to the bank in an escrow agreement with the Union Bank and Trust Company of Los Angeles, the intention of the parties being that the money involved should not be paid to the bankrupt until February 20, 1953, at which time the transaction was to be completed, the escrow closed and [54] the money passed. The mortgage was then to take full force and effect. It was recorded on the same date, February 20, 1953. It was stipulated that

certain creditors existed prior to the recording and were also creditors at the date of the bankruptcy.

The Referee held that the escrow itself was void because it was made to one of the parties of the transaction and not to a stranger, and that since it was void, the actual delivery of the mortgage took place on February 4, 1953, with the mortgage taking effect at that time. He also held the mortgage was a grant within the meaning of Section 1056 of the Civil Code of California, and the delivery of a grant to the grantee is necessarily absolute and cannot be conditional. Sixteen days thereafter was too long a time to withhold the chattel mortgage from recordation.

This court feels it is not necessary in this case to pass upon the question of the validity of the escrow. The act of the parties clearly indicates that the mortgage was accepted conditionally.

The Referee assumed the mortgage was a grant. I do not believe this is correct. A grant indicates a transfer or conveyance of title, while a chattel mortgage is a contract, whereby certain chattels are hypothecated as security for a debt, without change of possession or title. [Cal.C.C. 2920, West's Annotated Code; *Stewart v. Powers*, 98 Cal. 514, 33 P. 486 (1893); 10 Cal. Jur.(2d) 329, §43 and cases cited in Note 11.] A contract can always be delivered conditionally. [*Spade v. Cossett*, 110 Cal.App. 2d 782, 243 P. 2d 799 (1952).]

The evidence shows clearly that the delivery to the bank on February 4, 1953, was conditional in that

the money was not to be turned over and the transaction completed [55] until February 20, 1953. This intention is shown by the fact that there was recorded a notice of intention to execute and deliver this mortgage on February 20, 1953, when the consideration was to be paid. This notice was recorded in compliance with Section 3440.1 of the California Civil Code.

It must be remembered that a chattel mortgage is merely security for a debt and if there is no debt there is no mortgage. In this case the mortgage did not come into existence until February 20, 1953, when the bank paid over the money and at that time the mortgage became a lien. [Western Loan & Bldg. Co. v. Scheib, 23 P.2d 745; West's C.C. of Cal. & Annotations].

The Trustee urges that the mortgagor was a manufacturer and not a merchant but the Referee found that the mortgagor was not only a manufacturer but a jobber. A jobber has been recognized as a wholesaler. [Words & Phrases, Vol. 23, page 38]. But whether the mortgagor comes within the purview of Section 3440.1 is immaterial inasmuch as the chattel mortgage was delivered conditionally and did not become effective until the consideration had passed on February 20, 1953, the day of the recordation. It cannot successfully be contended that the chattel mortgage was not recorded promptly.

The order of the Referee is reversed and remanded with direction that the Referee proceed in

conformity with the opinions herein expressed.

Dated: This 15th day of December, 1955.

/s/ BEN HARRISON,

Judge

[56]

[Endorsed]: Filed Dec. 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Union Bank and Trust Co. of Los Angeles
and to Loeb and Loeb, its Attorneys:

You, and each of you, will please take notice that the Trustee in the above matter hereby appeals from the Order of Court heretofore filed on December 15, 1955; wherein the Order of the Referee declaring that certain chattel mortgage to be invalid was reversed.

Dated: January 17, 1956.

BROOKS AND HOFFENBERG

/s/ By GABRIEL HOFFENBERG,

Attorneys for Trustee

[57]

Affidavit of Service by Mail attached.

[58]

[Endorsed]: Filed Jan. 18, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 64, inclusive, contain the original

Petition for Reclamation;

Order to Show Cause Why Petition for Reclamation Should Not Be Granted;

Answer to Petition for Reclamation;

Memorandum by Referee;

Amended Findings of Fact, Conclusions of Law and Order Decreeing Chattel Mortgage Invalid as to Trustee and Creditors;

Petition for Review of Order of Referee Dated 8/1/55;

Referee's Certificate on Review;

Memorandum of Opinion;

Notice of Appeal;

Respondent's Designation of Contents of Record on Appeal;

Statement of Points Upon Which Appellant Intends to Rely; which, together with Petitioner's exhibits 1, 2, 3, 4 & 5, all in the above-entitled cause, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the

foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of February, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk

/s/ By CHARLES E. JONES,
 Deputy

In the District Court of the United States, Southern
District of California, Central Division.

In Bankruptcy No. 62,222-BH

In the Matter of: S. A. WILLEN COMPANY, a
corporation, Bankrupt.

HEARING RE: ORDER TO SHOW CAUSE;
UNION BANK AND TRUST COMPANY
VS. FRANK M. CHICHESTER, TRUSTEE,
RE PETITION IN RECLAMATION

Before: Honorable David B. Head, Referee in
Bankruptcy.

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable David B. Head, United States Referee in Bankruptcy, at his courtroom, 340 Federal Building, Los Angeles, Califor-

nia, at the hour of 10:00 o'clock a.m. on Wednesday, March 16, 1955.

Appearances of Counsel: For the Petitioner, Union Bank and Trust Company: I. B. Kornblum, Esq. For the Respondent, Trustee: Brooks & Hoffenberg, by Lon A. Brooks, Esq. [1*]

The Referee: Now, we come to the matter of S. A. Willen Company. The bank here is the moving party.

Mr. Kornblum: Yes. We have a petition for order to show cause. Does your Honor want the bank to put on its case first?

The Referee: I presume you can agree upon—perhaps we can and perhaps we can't—the fact that there was a chattel mortgage.

Mr. Kornblum: Yes, I have some photostatic copies here, and I have the custodian of the records of the bank here, in the event there should be any question of these documents. If counsel will stipulate, perhaps we might save some time.

Here is a photostatic copy. I think the Trustee has attached to his answer a copy of the photostatic copy of the mortgage.

Mr. Brooks: Yes.

Mr. Kornblum: This is not a photostatic copy, Mr. Brooks. (Hands document to counsel.) We can put that in evidence.

Does your Honor require that the custodian take

* Page numbering appearing at top of page of original certified Reporter's Transcript.

the stand to identify these? We can stipulate to these.

The Referee: See how much you can stipulate to. [2]

Mr. Brooks: We will stipulate, your Honor, just as soon as we can compare it.

Mr. Kornblum: I might state that the photostatic copy was furnished to me by the bank, so I think you will find it to be correct.

Mr. Brooks: If you say it is correct, we will so stipulate.

Mr. Kornblum: I don't say it is correct. The bank furnished it to me. I am offering it. I don't think there will be any dispute.

Mr. Brooks: I don't think there will be. We have an original which is a little different than the one offered by Mr. Kornblum.

Mr. Kornblum: We will offer this as the moving party's Exhibit 1.

The Referee: It will be Petitioner's Exhibit 1.

Mr. Kornblum: I have two notes, photostatic copies of notes, and you may examine them and I believe you will find them to be all right. I will offer them, if you will stipulate.

Mr. Brooks: What is it you would like to stipulate; that these are photostatic copies of the original notes?

Mr. Kornblum: That is right.

Mr. Brooks: So stipulated.

Mr. Kornblum: I offer now as the next in number on behalf of the moving party a note dated Febru-

ary 4, 1953, [3] for \$27,125.04. That will be our next in number.

The Referee: Petitioner's 2.

Mr. Kornblum: I offer as the next in number, as Petitioner's Exhibit 3, a note dated February 19, 1954, for \$10,425.

The Referee: It will be Petitioner's Exhibit No. 3.

(Mr. Kornblum hands documents to Mr. Brooks.)

Mr. Brooks: Is this the record of payment?

Mr. Kornblum: This is the copy of the records.

Mr. Brooks: Copy of what records? Is this the bank's records of payments made?

Mr. Kornblum: Yes; payments made ledger sheet.

Mr. Brooks: Showing payments made by the Wil-len Company?

Mr. Kornblum: Is that correct, Mr. Lukens?

Mr. Lukens: That is right.

Mr. Kornblum: Let me show these to Mr. Lukens, so he can identify them now.

Will you just examine these and see if this is the correct copy?

In the meantime, I will offer something else. I wish to offer a photostatic copy of Notice of Intention recorded on February 5, 1953. I would like to ask counsel through the Court, your Honor, if counsel has a photostatic copy of that Notice of Intention and whether it has been in their files during the pendency of these proceedings. [4]

Mr. Brooks: I can answer that. We do have such

a copy taken from the records just in the past few days.

Mr. Kornblum: You just took it in the past few days?

Mr. Brooks: That is right.

Mr. Kornblum: Not prior to the time you filed your answer?

Mr. Brooks: We took it on March 4, 1955.

Mr. Kornblum: That was subsequent to the time you filed your answer?

Mr. Brooks: Prior to that time.

The Referee: That doesn't make any difference.

Mr. Kornblum: It will make a difference as the case develops, your Honor. It doesn't make any difference technically.

Will you stipulate that that is a photostatic copy of the Notice of Intention?

Mr. Brooks: Correct.

Mr. Kornblum: I offer it as the next in evidence.

The Referee: That will be Petitioner's Exhibit 4.

Mr. Kornblum: Is this all right? Did you examine these?

Mr. Lukens: Yes, I did.

Mr. Kornblum: Are these correct?

Mr. Lukens: That is correct.

Mr. Kornblum: Are you through examining these? [5] This is a record of the bank's ledger sheet. Is that correct, Mr. Lukens?

Mr. Lukens: That shows the payments made on the notes; the amounts due.

Mr. Brooks: And the date, of course, of each payment recorded, with a notation at the top of one

of them, "Do not release any papers until the advance against this loan has been paid in full."

We have no objection. We will stipulate that they are the bank's records, if Mr. Lukens says so.

Mr. Kornblum: We offer these three sheets as our next in number.

The Referee: That will be Petitioner's Exhibit 5.

Mr. Kornblum: Now, your Honor, with these exhibits in evidence, I now wish to point out certain allegations in the Trustee's answer.

The Referee: Let us not argue this case now.

Mr. Kornblum: Well, the purpose of my asking the question was to point up something here which I think the Court should take notice of. That is not by way of argument. It is merely by way of—it is not evidentiary. However, the Court should take notice of the fact that nowhere in the answer and nowhere in the original petition is any reference made to the Notice of Intention; and with that statement that I wish your Honor to note, the Petitioner will rest. [6]

Mr. Brooks: Would the Court like to hear from us?

The Referee: If you have any evidence to offer, yes.

Mr. Brooks: The only evidence we have to offer is this, in support of our answer to the petition:

It relates to the names of creditors of the S. A. Willen Company as at the date of the execution of this mortgage, together with the amount owed to each of them; next, the names of the creditors of the corporation as of the date of the recordation of the

mortgage, together with the amount owed by each of them.

Mr. Kornblum says he is not familiar with this and, therefore, not in position to stipulate to it.

Mr. Kornblum: I will state this, counsel——

Mr. Brooks: Let me finish this in just a moment.

Mr. Kornblum: Excuse me.

Mr. Brooks: Mr. Hind, the certified public accountant who is associated with Mr. Mulherin and who made an investigation of these records, is in court. His testimony, if sworn as a witness, would be that these names and amounts are correct.

Are you willing to stipulate that that will be his testimony?

Mr. Kornblum: I am willing to stipulate that he will testify that way; that that will be his testimony.

Mr. Brooks: He will so testify, if sworn as a witness. [7]

Mr. Kornblum: All right. I wish to reserve, however, an objection as to the materiality of that, on the grounds it is incompetent, irrelevant and immaterial, and the Court may rule on that later. I just want to reserve my rights.

The Referee: Very well.

Mr. Brooks: He certainly has a right to reserve that. I merely want to get this before the Court. Mr. Hind may not be kept here, if he is not needed. May he be excused?

The Referee: Yes.

Mr. Kornblum: Yes. May Mr. Lukens be excused now? I don't think we will need him as a witness for the bank.

Mr. Brooks: I don't need him, as far as we are concerned.

The Referee: Both witnesses may be excused.

Mr. Brooks: Mr. Hind, just one moment before you go, I have one other thing.

If the Court please, with reference to the names of the creditors and amounts owed to each as of the time of bankruptcy, Mr. Hind would also testify that—well, I don't think that is necessary. That is a matter of record.

Mr. Kornblum: Yes.

Mr. Brooks: All right. That is all we have in the [8] way of evidence, your Honor. I have prepared a memorandum brief on the matter here, which I would like to submit, and if the Court would like to hear from me further with respect to our position on the matter of intention and the matter of mortgage generally, I will be glad to respond to what counsel has said. We cover it in our brief.

Mr. Kornblum: I would like at this time to make several motions in regard to the answer, to strike certain portions of the answer, so that we can get the issues clarified. If I may do that at this time, your Honor, I think that will help us get the issues clarified.

Mr. Brooks: Well, I would assume that Mr. Kornblum may reserve any statements until he has made any motion.

Mr. Kornblum: I am not making any statements. I am trying to help the Court get all the facts before it so that we can argue it clearly.

Mr. Brooks: As soon as you make your motion, we will proceed.

Mr. Kornblum: I want to move now, your Honor, to strike the Allegation No. 6 on page 5, which states: "That the respondent is further informed and verily believes, and therefore alleges, (a) each of the said notes purported to be secured by the said chattel mortgage is endorsed by Joseph Spiegleman, as guarantor, and that each thereof now bears his endorsement; and (b) said Joseph Spiegleman is the father-in-law of Martin G. Kaplan, one of the [9] partners of the firm of Los Angeles Cotton Company, one of the creditors of the estate of said bankrupt," on the grounds that it is absolutely redundant and has nothing to do with the issues in this case, as far as I can see.

In my opinion, this furnishes—I suspected this, but this is now confirmed in my mind as being the motivation of the position taken in this matter. I think it is absolutely incompetent, immaterial and irrelevant and has nothing to do with the issues in this case whether Mr. Spiegleman is the father-in-law of Martin G. Kaplan, one of the creditors, because there is no showing and there is no attempt to show that Martin G. Kaplan of the Los Angeles Cotton Company profited by this. I don't see what the purpose of it is, except that it does furnish the motive for me, which I will argue later.

I make that motion for the purpose of the record.

Mr. Brooks: Is your motion to strike the entire paragraph?

Mr. Kornblum: That paragraph, yes—no; I will withdraw that.

I move to strike subdivision (b) of that paragraph, because subdivision (a) is merely a recitation of a fact.

The Referee: All right.

Mr. Brooks: We stipulate it may go out. [10]

Mr. Kornblum: All right. That subdivision (b) may go out.

The Referee: All right.

Mr. Brooks: Beginning with the words “said Joseph Spiegleman,” and subdivision (a) remains.

Mr. Kornblum: Subdivision (a) may remain. That is all right.

Now, I believe that is the only motion.

Mr. Brooks: Have you finished?

Mr. Kornblum: I don’t know how the Court wants this matter argued, whether he wants me to argue first or for you to argue first.

Mr. Brooks: Well, I take it we should hear from the moving party first. I will be glad to respond to it.

The Referee: There is only one point involved in this case, as I see it. That is whether the delay in recordation has been explained. Isn’t that the question, gentlemen?

Mr. Brooks: That is our view of the case exactly. May I, before we begin, supplement what the Court has said?

Mr. Kornblum: I just want to get this clear, counsel. Pardon me.

I don’t think there was a delay in recordation,

which the Court refers to. The Notice of Intention was filed. [11]

The Referee: Well, your instrument is dated February 4th, and it was recorded on February 20th.

Mr. Kornblum: No, your Honor. The Notice of Intention was under Section 3440.

The Referee: Your instrument is dated February 4th, and it was recorded on February 20th.

Mr. Kornblum: Yes, but there is in evidence a Notice of Intention.

The Referee: As I say, the question is now: Does that explain your delay in recording?

Mr. Kornblum: Well, if I may look at that Notice of Intention, the Notice of Intention states that it will not be paid until — the money will not be turned over until the 20th. In other words, so that I get the situation clear in my mind, this Notice of Intention states as follows:

“That S. A. Willen Corporation, mortgagor, whose address is 5871 West Jefferson Street in the City of Los Angeles, County of Los Angeles, State of California, intends to mortgage to the Union Bank and Trust Company of Los Angeles, mortgagee, whose address is 760 South Hill Street in the City of Los Angeles, County of Los Angeles, State of California, machinery and equipment of a certain manufacturing business known as S. A. Willen Company and located at 5871 West Jefferson Street in the City of Los Angeles, County of Los Angeles, State of California, and that an executed mortgage of the same will be delivered and [12] consideration therefor

paid at 10:00 o'clock a.m. on the 20th day of February, 1953, at the Escrow Department of the Union Bank and Trust Company at 760 South Hill Street in the City of Los Angeles, County of Los Angeles, State of California. Dated February 4, 1953." It is signed S. A. Willen Company, mortgagor, by S. A. Willen, president, and Norton B. Le Vine, secretary-treasurer. It was subscribed and sworn to before a notary public.

Now, the document was recorded as Document No. 3308 at the request of the Union Bank and Trust Company on February 5, 1953, at the hour of 4:30 p. m. in Book 40907, page 152, Official Records, County of Los Angeles, California.

Now, that explains the delay, because the Notice of Intention says that the money will not be paid over until the 20th and until this money is paid over, they couldn't record it.

The Referee: When was the money paid over?

Mr. Kornblum: On the 20th day of February.

The Referee: I was looking at the record here. I can't make it out.

Mr. Kornblum: Maybe I shouldn't have let Mr. Lukens go. But the money was paid at the time. There is an escrow and on the 20th day of February—in other words, the bank even took perhaps a longer time than the law even requires to give notice to creditors. Now, when the——

The Referee: It shows here apparently that the [13] money was advanced on "2-23-54," and——

Mr. Kornblum: And they didn't have to advance it until 2-20.

The Referee: And 2-24——

Mr. Kornblum: That is 1953. There seems to be some confusion in the pleadings. It is 1953.

The Referee: 2-24-53?

Mr. Kornblum: That is right.

The Referee: Then, you have another record over here, which is another advance made, "2-23-54."

Mr. Kornblum: That is right. Now, if your Honor will look at the mortgage, there is a provision in the mortgage which——

The Referee: The date I was looking for here is the date of the first advance.

Mr. Kornblum: It was three days after the 20th. In other words, here is what happened. The bank took exceeding precaution. They not only gave the notice that it will be for a longer period than required by Section 3440, but they do not even give them the money until three days after the time when they could have given it to them.

Does that clear up the record as far as what your Honor was asking about?

The Referee: I just want the date the money was advanced.

Mr. Kornblum: That is the date. There is a lot of [14] confusion, I see, in the answer. You probably want—the date here is incorrect.

Mr. Brooks: What is the date?

Mr. Kornblum: On page 7 at the top of the page, "date of recordation thereof, to wit, February 20, 1954." You want to change that to 1953?

Mr. Brooks: Yes; change that to 1953.

Mr. Kornblum: Is that a typographical error?

Mr. Brooks: That is a typographical error. The answer should be February 20, 1953.

The Referee: What page is that?

Mr. Kornblum: At the top of page 7 of their answer.

Mr. Brooks: The first line.

Mr. Kornblum: On the first line. I assumed that that was a typographical error and in our stipulation, there was a similar typographical error made in the original petition you filed. We tried to correct it. Then, evidently, the same mistake was made.

Mr. Brooks: They will know that it is February 20, 1953. It shows in the document itself.

Mr. Kornblum: What I want to point out and the reason I asked the question is this: This is the first time I knew they had even examined the records to find out that there was a Notice of Intention, because I can state as far as I am concerned, that had they searched the [15] records and had they known that a Notice of Intention to mortgage was filed, and had they examined the law carefully, in my opinion, this thing never would have been filed, because there was no reason for it. This thing does not make sense. The bank has complied with all the provisions of the law and even went further than is required by the law.

Now, all the allegations, and the reason I reserved my objections as to materiality, as to who was a creditor at what time, I think is immaterial.

The question is: Was this mortgage made in accordance with the laws of the State of California, and if so, whether the Notice of Intention to Mort-

gage was noticed and if it was noticed, it doesn't make any difference who the creditors were or what amounts they were in.

The point is that the burden now shifts. As far as we are concerned, I believe we have made out a case. We have complied with the law and the presumption is that it is made in good faith.

Now, the Trustee comes in and says—and here are the allegations in their answer, your Honor. Now, I want to point this out——

The Referee: I have read the answer.

Mr. Kornblum: Their answer is that at the time that the creditors had no notice and this is without foundation. [16]

The Referee: Let us hear from Mr. Brooks then.

Mr. Brooks: If it please the Court, counsel is exactly correct. We have examined the records and tried to examine all of them with utmost care. He places great stress on the Notice of Intention.

Mr. Kornblum: I beg your pardon?

Mr. Brooks: I say, you have placed great stress on the Notice of Intention. We have made no reference to it, of course, for the reason that we believe it is entirely superfluous. It is not and cannot and does not take the place of recordation. The Code specifically requires recordation.

Now, the section under which we are proceeding and the section in which we are interested here is I think Section 2957 of the Code, which requires recordation.

Now, in response to what your Honor has just said about the question presented, we think that is

exactly it. First of all, is a mortgage withheld from record beyond a reasonable time required for its prompt recordation void as to creditors? And the second point is: Is a delay of 16 days in the recording of a mortgage immediately following its execution a reasonable delay as to the rights of those creditors?

The Referee: No; 16 days is too long. I don't know a single case in California which permitted a delay of 16 days, but the point here, Mr. Brooks, as I see it, is that [17] this mortgage was not delivered until December 20th, and if it was recorded on the date of its delivery——

Mr. Brooks: That is February 20th.

The Referee: February 20th, yes. We are all mixed up in the dates.

Mr. Brooks: I was instrumental in causing the confusion. I subscribe to the fact, at least, that it is February 20th.

The Referee: The mortgage here was delivered on February 20th, and that is the effective date of the mortgage. Moneys were not transferred until three days after that, and the mortgage was recorded apparently on the same date it was delivered.

Mr. Brooks: That is correct.

The Referee: The date of delivery is the date. That is the effective date of the mortgage.

Mr. Brooks: We are going on this point: That it is the date of the mortgage, the date of execution that was misleading to the creditors; that it lulled them into a sense of false security, because the date——

The Referee: No; no. The only knowledge that the creditors can be charged with would be the recordation date.

Mr. Brooks: The recordation?

The Referee: Yes, and if any of the creditors would be affected by Section 3440, then the notice that [18] was given on February 4th, that is, the recorded notice of February 4th, would be notice to perhaps some class of the creditors.

I don't think it is necessary to go into Section 3440. I think what we are concerned with here is: What is the effective date of this mortgage, which appears to me to be February 20th?

Mr. Brooks: It is our contention that Section 3440 has no application here. I take it from what the Court has said, that he is inclined to agree.

The Referee: I think we can disregard it.

Mr. Brooks: All right. What is in the Court's mind is the effective date of the mortgage. The escrow has been referred to here. Apparently, an escrow was entered into. I see no necessity for that. My interpretation of the authorities is that recordation must be made immediately upon execution or as soon thereafter as may be practical so as to give notice and to bind third parties. Otherwise, the mortgage is void.

It seems to me that the cases — I think we have summarized all of them — go to that very thought, the date between the date of execution and the date of recordation, and that it must be recorded regardless of the date the money was advanced. It must be

recorded immediately after its execution, or as soon as practical.

Now, that, I think, sums up the whole case. [19]

The Referee: You are dealing here with a transaction in which in order for this chattel mortgage to become effective, it had to be executed and delivered.

Mr. Brooks: All right. It was executed 16 days before delivery, or at least 16 days before delivery. It must be executed, of course——

The Referee: This chattel mortgage became effective upon its delivery, which was February 20th, and it was recorded the same day.

Mr. Brooks: Well, it is the date of execution that we are going to, and it seems to me that the cases swing around that point; that recordation is required immediately after execution or as soon as may be practical.

We have an escrow here, which it seems to me was an idle act. We have a mortgage executed on February 4th and was not recorded until the 20th, 16 days later. The date of execution, it seems to me, is not only vital but perhaps determinative in this whole thing in the light of the decisions. We don't think that——

The Referee: Give me a decision where there is a question of the date of execution overriding the date of delivery.

Mr. Brooks: Well, recordation is held generally and I think it takes the place of delivery.

The Referee: No; no. Recordation is notice.

Mr. Brooks: Notice to the world. [20]

The Referee: That is right.

Mr. Brooks: All right. I am referring now to Wolpert vs. Gripton. Your Honor is familiar with that case. That is 213 Cal. 474, in which it is held that creditors at the time of execution, and those who continued as such to the time of recordation, suffered prejudice and were injured by the delay in recording, and those whose claims arose during the interval between execution and recordation definitely parted with value after execution.

The Referee: You will find any number of cases where it refers to execution and when these executions——

Mr. Brooks: And recordation.

The Referee: There has been no question raised there whether there was a difference between the date of execution and the date of delivery.

Mr. Brooks: Correct.

The Referee: Now, we have had in this Bankruptcy Court in the last few years where this question has arisen, but I can't tell you of any reported cases right on this particular subject about this difference in the date of execution and the date of delivery.

Mr. Brooks: The latest case I have in the Federal courts is one which your Honor is perfectly familiar with, I am sure, because it is a recent one. It is the matter of *In re Kessler*. The facts are very closely parallel. The Bank of America sent the mortgage to the Recorder's [21] office to be recorded.

The Referee: Yes.

Mr. Brooks: And they asked for a bill and there was some delay there, a delay of 14 days.

The Referee: I know, but the mortgage had been executed and taken over to the Clerk's office. It was tangled up in the Recorder's office, and it was 14 days before they got the fee paid.

Mr. Brooks: That is right, but our position is based solely upon that interval existing between the date of execution and the date of recordation. That is the whole thing.

I believe that I have summarized all the cases here, and I believe they sustain that view. May I hand up my memorandum and give a copy to counsel?

The Referee: All right. Have you got a case that supports your position, Mr. Kornblum, right squarely?

Mr. Kornblum: I have not prepared any. Counsel hasn't served me with any file brief.

My position is that the delivery of the money was made at the time the mortgage was delivered on the 20th, at the time which the notice stated the transaction and the escrow would be closed, and all things which took place prior to that time do not affect this matter.

The delivery, as your Honor has said, of the mortgage, the delivery of the money is the effective date. [22] Now, I don't think counsel can find anything that will—well, I still say that Section 3440 is a very material factor involved in this thing, because it gave notice to creditors that there was an escrow,

and it is not true that the creditors had no notice, as alleged in the answer.

Mr. Brooks: You are referring to the Notice of Intention?

Mr. Kornblum: Well, that they had no notice. Notice of Intention under Section 3440 provides that once that is filed, the presumption is that it is made in good faith and you have to overcome the presumption. In other words, our position is that the burden shifts to anyone who questions the good faith and the validity.

The burden, in my opinion, shifts now to the Trustee to prove that it was not made in good faith. Their allegations in the answer here, in my opinion, haven't been sustained. There is nothing here, nothing before the Court, that will sustain any of the allegations that the bankrupt has stated here on page 4, which fact the Union Bank as a named mortgagor now or ever had cause to believe.

Those allegations are not proper in view of the fact that an intention was filed, because the presumption is that once the notice under Section 3440 is filed, the burden shifts.

Mr. Brooks: Maybe I can help the Court. [23]

The Referee: You set up an escrow and, as I say, under the terms of the escrow this mortgage was not delivered to you until February 20th.

Mr. Kornblum: That is correct.

The Referee: And that is the effective date, and it was recorded at the time of the delivery.

Mr. Kornblum: On the same day.

The Referee: If recording is required within a

reasonable time after February 4th, why then, of course, you have gone over too far.

Mr. Brooks: Maybe I can help the Court. I see exactly what is in the Court's mind. You are wondering whether what you call the effective date of the mortgage may take the place of the date of execution.

The Referee: That is right.

Mr. Brooks: I wonder if we might submit a memorandum on that specific point. We have covered the other points and I am convinced that Section 3440 has no application because it specifically excludes mortgages.

The Referee: It makes no difference if it applies here or not. We presume there is good faith here, and there was an escrow set up,—

Mr. Brooks: That is correct.

The Referee: (Continuing)—for the purpose of giving notice under Section 3440, and by the provisions of that escrow that mortgage was not to be delivered until [24] February 20th at a certain time—

Mr. Brooks: I know the Court's point, and there is only one point. That is it, if we may submit a memorandum of authorities.

The Referee: (Continuing)—and that is when the mortgage was delivered; and as I say, no moneys were advanced prior to that time, so no credit was obtained by reason of that mortgage until after February 20th, so no creditor giving credit during, say, from February 4th to February 20th—

Mr. Brooks: Yes, there were.

The Referee: No. I say, no creditor giving credit during that period of time would have been damaged. He would not be giving credit without knowledge of a lien that had been created, because no lien had been created, no mortgage had been delivered and no moneys had been advanced.

Mr. Brooks: That is right.

The Referee: No secured debt had been created.

Mr. Brooks: But if he had notice of the execution of the mortgage on February 4th, he may well have dealt with the debtor differently than he did.

The Referee: Then, if he had gone over and looked at the recording of notices of intention, then he would have seen that they did intend to deliver the mortgage on February 20th. [25]

Mr. Brooks: A notice of intention, we believe, can never take the place of recordation. Anything can happen.

The Referee: The point is, I believe, the effective date here is February 20th. While I can't give you the name of the case, I have held that in previous cases.

Mr. Brooks: Maybe we can find it.

The Referee: That is the date of delivery.

Mr. Brooks: If we can submit a memorandum on it——

The Referee: I don't know whether you can find it or not.

Mr. Brooks: I am talking about the case you have in mind.

The Referee: There was a decision by Judge Yankwich in a case—I have no memory for names.

Mr. Brooks: I can give it to you in just a moment.

The Referee: It was on the question of a conditional sales contract of mining machinery.

Mr. Brooks: I believe that is it. Is that In re Hanson? That was his case.

The Referee: No, that is not that citation. That is not his case. That is 268 Fed.

Mr. Brooks: 268 Fed.?

The Referee: He doesn't date back to 268 Fed. He dates back, but not that far.

Mr. Brooks: Not that far, no. [26]

The Referee: There is a decision by Judge Yankwich which involves the recording of a conditional sales contract on mining machinery, which under the laws of California must be recorded within the county where the machinery is located, I believe, in order to be effective against creditors, and there is a question of date of delivery in that case.

I don't want to state what it concludes, in his words, but I do remember the case.

Mr. Brooks: I had in mind Mercury Engineering.

The Referee: That is not the case.

Mr. Brooks: That is 68 Fed. Supp.

The Referee: The case I am referring to is subsequent to Mercury Engineering.

Mr. Brooks: Mercury Engineering would not be it, because it involved a purchase money mortgage.

The Referee: Let us let this matter stand submitted. Now, if you find anything further on that matter——

Mr. Brooks: We will file it.

Mr. Kornblum: I will expect counsel to file it, and if he files it, I will respond to it.

The Referee: All I want you to do is bring me a letter saying, read case so-and-so. That is all you need to do.

Mr. Kornblum: If we find one on that. [27]

The Referee: Yes.

Mr. Kornblum: I just want to call your Honor's attention to the significance of Section 3440. I think it is important, because the intention—here is the Notice of Intention, and the Notice says, "That an executed mortgage of the same will be delivered."

That is the point—I mean, that is why this is material. It states in that many words that the mortgage will be delivered and consideration paid on the 20th.

Now, that states when the delivery was to be made, and that, I think, in the absence of any showing to the contrary, will have to be accepted.

The Referee: I think so, too.

Mr. Kornblum: That is the whole point.

Mr. Brooks: I believe the Court thinks that will take the place of recordation.

Mr. Kornblum: No.

The Referee: No; that is the effective date. After February 20th, there must be a timely recording; after that date rather than that February 4th date.

Mr. Brooks: Rather than the date of execution?

The Referee: That is right.

Mr. Kornblum: That is right.

The Referee: I think February 20th is the gov-

erning date here. As I say, I have previously held so, and I think you are wrong. [28]

Mr. Kornblum: Does your Honor wish any time set for the filing of any further memorandum?

The Referee: Do this within the next four or five days, or a week.

Mr. Kornblum: We will make it a week.

Mr. Brooks: A week; that is better.

Mr. Kornblum: With regard to the other petition in connection with the payment of attorney's fees, if your Honor should sustain the Petitioner's position, the note prays that if any action has to be taken, a reasonable attorney's fee as set by the Court will be paid. Now, I have put it very reasonable.

The Referee: How much have you indicated?

Mr. Kornblum: \$350. I think that is extremely reasonable in view of——

The Referee: You have only spent an hour here today.

Mr. Kornblum: I have done other work. My file is very voluminous.

The Referee: I am talking about the litigation. You drew up the pleadings.

Mr. Brooks: It should be paid by his client.

Mr. Kornblum: Not if the Petitioner's position is sustained. I believe that the mortgage itself provides it and the notes, that this will have to be paid by you. I don't think there is any question about it.

The Referee: I will make an allowance.

Mr. Kornblum: Thank you.

(Whereupon the hearing was concluded.) [30]

[Endorsed]: Filed July 22, 1955.

[Endorsed]: No. 15038. United States Court of Appeals for the Ninth Circuit. Frank M. Chichester, Trustee in Bankruptcy of Estate of S. A. Willen Company, a corporation, bankrupt, Appellant, vs. Union Bank & Trust Co. of Los Angeles, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 18, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

Case No. 15038

FRANK M. CHICHESTER, Trustee,

vs.

UNION BANK & TRUST CO.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Statement of Points

The points upon which the appellant will rely on appeal are:

1. The Court erred in reversing the order of the referee decreeing the chattel mortgage invalid as to the trustee and creditors.

2. The Court erred in refusing to pass upon the question of the validity of the escrow wherein the mortgagee was also the escrow holder.

3. The Court erred in holding that the chattel mortgage was delivered conditionally as against the rights of intervening creditors where the referee found that the mortgage was delivered "absolutely".

4. The Court erred in holding that whether the mortgage comes within the purview of Section 3440.1 is immaterial inasmuch as the chattel mortgage was delivered conditionally.

5. The Court erred in refusing to hold that the delivery of the mortgage to the mortgagee-escrow holder was an absolute delivery to the mortgagee on February 4, 1953.

6. The Court erred in refusing to hold that the provisions of the Civil Code of California applying to grants in escrow apply to all written instruments.

7. The Court erred in failing to consider the effect on the rights of creditors of the execution and deposit of a mortgage in an ineffective escrow held by the mortgagee as escrow holder.

8. The Court erred in finding that according to the terms of the escrow contract the amount of the loan was paid to the bankrupt on February 20, 1953, when the record clearly shows that the money was actually paid over to the bankrupt on February 24th, 1953.

9. The Court erred in holding that the mortgage came into existence on February 20, 1953, when the bank paid over the money, while the record clearly

shows that the bank did not pay over the money until February 24th, 1953.

10. The Court erred in failing to hold that there was no debt in existence at the time of recordation of the mortgage on February 20, 1953.

11. The Court erred in failing to consider the effect on the rights of creditors, of the recordation of the mortgage before the debt, for which the mortgage is security, came into existence.

12. The Court erred in failing to consider the validity of the mortgage which was recorded four (4) days prior to the time that the money was paid over to the debtor.

13. The Court erred in failing to consider the effect on the rights of creditors, of the delay of sixteen days between the execution and recordation of the mortgage.

Designation of Record

Appellant in the above-entitled action designates the following portions of the record, proceedings and evidence to be contained in the record on their appeal in the above-entitled action:

1. Petition for reclamation filed February 15, 1955.

2. Order to show cause why petition for reclamation should not be granted filed February 15, 1955.

3. Answer to petition for reclamation filed March 9, 1955.

4. Memorandum by the referee dated June 9,

1955 ruling that the chattel mortgage invalid as to the trustee and creditors.

5. Substitution of Attorneys, signed by the Union Bank and Trust Company on June 20, 1955, consented to by I. B. Kornblum on June 20, 1955, and accepted on June 23, 1955 for Loeb and Loeb by Alfred I. Rothman.

6. Referee's amended findings of fact, conclusions of law, and order decreeing chattel mortgage invalid as to the trustee and creditors dated August 1, 1955.

7. Petition for review of order of referee dated August 1, 1955 filed August 11, 1955 excluding amended finding of fact, conclusions of law and order decreeing chattel mortgage invalid as to the trustee and creditors.

8. Referee's certificate of review to the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division.

9. Memorandum opinion by Honorable Judge Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division, reversing the order of the referee.

10. Notice of appeal filed January 18, 1956.

11. Reporter's Transcript of proceedings, Wednesday, March 16, 1955, 10:00 A.M., before Honorable David B. Head, Referee in Bankruptcy.

12. Appellee-petitioner's exhibit No. 1, Chattel Mortgage.

13. Appellee-petitioner's exhibit No. 2, Note, dated February 4, 1953, in the amount of \$27,125.04.

14. Appellee-petitioner's exhibit No. 3, Note, dated February 19, 1954, in the amount of \$10,-425.00.

15. Appellee-petitioner's exhibit No. 4, Notice of intention, recorded on February 5, 1953.

16. Appellee-petitioner's exhibit No. 5, three ledger sheets of the Union Bank and Trust Company re S. A. Willen Co.

17. This appellant's statement of points upon which the appellant will rely on appeal and designation of the record to be contained in the appeal in the above-entitled action.

Dated: This 5th day of March, 1956.

BROOKS & HOFFENBERG and
GABRIEL HOFFENBERG

/s/ By GABRIEL HOFFENBERG,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 6, 1956. Paul P. O'Brien,
Clerk.

